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November 23, 2015

VIA HAND DELIVERY & EMAIL

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Re: OSHPD Notice of Proposed Changes to the California Mechanical Code:
2015 Triennial Code Adoption Cycle: Opposition to Proposed
Amendments of CMC §§ 407.4.1.4, 602.1.

Dear Mr. Nearman and Mr. Gall:

The following comments are submitted on behalf of the Joint Committee on Energy and Environmental Policy ("JCEEP") and the Coalition for Safe Building Materials ("Coalition") in opposition to the 2015 California Building Standards Code amendments proposed by the Office of Statewide Health Planning and Development ("OSHPD") that would modify Sections 407.4.1.4 and 602.1 of the California Mechanical Code to allow medical clinics the use of use of concealed spaces or independent construction within buildings as ducts or plenums and to allow plenum duct returns ("the OSHPD Plenum Amendments").

Currently, California Mechanical Code § 407.4.1.4 prohibits clinics (and all other healthcare facilities under OSHPD's building standards jurisdiction) from using the space above a ceiling as an outside-air, relief-air, supply-air, exhaust air, or return-air plenum. In addition, California Mechanical Code § 602.1 prohibits clinics (and all other healthcare facilities under OSHPD's building standards jurisdiction) from using concealed spaces or independent construction within buildings as ducts or plenums. OSHPD proposes amending the 2013 California Mechanical Code to exempt OSHPD 3 clinics from both of these prohibitions.

JCEEP and the Coalition oppose these proposals on the grounds that these exemptions are likely to increase health and safety risks to patients and other building occupants.¹ These exemptions may also result in increased energy consumption and reduced patient privacy.² For these reasons, the Code Advisory Committee recommended denial of the OSHPD Plenum Amendments.

In addition to being poor public policy, the OSHPD Plenum Amendments must be rejected because they have been proposed without fully complying with the requirements of the California Environmental Quality Act ("CEQA").³ OSHPD has prepared a Negative Declaration to evaluate the potential impacts from these proposed code changes,⁴ but this document does not meet the requirements of CEQA and is legally inadequate. Because substantial evidence exists that the OSHPD Plenum Amendments may increase health and safety risks to patients and building occupants. CEQA requires preparation of an environmental impact report ("EIR") before the Amendments may be adopted.

The OSHPD Plenum Amendments also fail to meet the requirements of the California Building Standards Law. Health and Safety Code section 18930 requires that building standards be justified under the listed nine-point criteria. The OSHPD Plenum Amendments fail to meet Criteria 3 (the requirement that the adoption of standards be in the public interest) and Criteria 4 (the requirement that the adoption of standards would not be unreasonable, arbitrary or unfair.

¹ Dr. James Woods, *Review of Potential Impacts from the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* (November 16, 2015).

² Dr. James Woods, *Review of Potential Impacts from the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* (November 16, 2015).

³ Pub. Resources Code § 21000 *et seq.*

⁴ OSHPD, Initial Study/Negative Declaration for the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics (September 2015).

Adoption of the OSHPD Plenum Amendments would be contrary to the public interest and unreasonable, arbitrary and unfair because the approval of these regulations prior to full compliance with CEQA would violate state law and could result in public health, safety and environmental impacts. The OSHPD Plenum Amendments are also arbitrary because the analysis they rely upon is erroneous and not supported by substantial evidence.

For these reasons, JCEEP and the Coalition respectfully request that the Commission follow the recommendation of the Code Advisory Committee and disapprove the OSHPD Plenum Amendments or, in the alternative, table the proposal pending further study.

I. INTEREST OF THE COALITION AND JCEEP

The Coalition for Safe Building Materials is a coalition of environmental, consumer, public health, and labor organizations that have long advocated for effective, safe and environmentally-friendly building standards. The environmental, consumer, public health, and labor organizations that make up the Coalition represent thousands of Californians concerned about the safety and effectiveness of new building standards. The Coalition and its members have a long history of participating in proceedings of the California Building Standards Commission to advocate for pre-approval review of environmentally hazardous, potentially unsafe and substandard building standard proposals.

The Coalition's past advocacy has resulted in environmental review of many building materials and methods that have been proposed to reduce costs at the expense of maintaining longstanding safety and performance standards. These reviews have demonstrated that many of these proposals have presented undisclosed dangers to the public. These dangers have included toxic chemicals leaching into drinking water, increased fire safety risks, degradation of indoor air quality, health risks to construction workers, increased air pollution and reduced energy efficiency. As a result of these reviews, industry standards have been strengthened and restrictions or mitigation requirements have been adopted to better protect, workers, occupants and the general public from potential impacts related to proposed changes in building standard requirements.

The Joint Committee on energy and Environmental Policy is made up of the California sheet metal workers' local unions⁵ and more than 25,000 technicians working for over 600 contractors throughout California. The mission of JCEEP is to promote responsible environmental, indoor air quality and energy policy in California as it pertains to and impacts the HVAC industry. JCEEP's members have over 15 training facilities throughout the state and thousands of workers being trained daily in HVAC specialties, such as testing, adjusting and balancing, commissioning, green building design, energy efficiency, sound and vibration control, and indoor air quality.

The sheet metal workers' unions have long advocated for and participated in the development of building standards for mechanical systems in order to safeguard the public health, achieve energy efficiency and ensure performance and durability of systems. For example, in the 1980's, the sheet metal workers; unions and their contractors were among the first to bring attention to the problem of sick building syndrome, often diagnosed when buildings were made energy efficient to the detriment of the indoor environment of the building. Sick building syndrome causes are often attributed to problems with the HVAC systems.

JCEEP was established to continue this tradition of advocacy in California. JCEEP was formed on the premise that air handling systems need to be designed not just to manage comfort levels of indoor air, but also to protect against contaminants and health threats and to ensure energy efficiency.

II. THE PROPOSED OSHPD PLENUM AMENDMENTS MAY RESULT IN SIGNIFICANT PUBLIC HEALTH AND ENVIRONMENTAL IMPACTS

The OSHPD Plenum Amendments should be rejected because they may result in significant public health, safety and environmental impacts. Attached as exhibits to this letter are a copy of JCEEP's and the Coalition's October 19, 2015 *Comments on the Initial Study/Negative Declaration on the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* ("Coalition OSHPD Plenum ND Comments") and a copy of Dr. James Woods' November 16, 2015 *Review of Potential Impacts from the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3*

⁵ The sheet metal workers unions are locals of the International Association of Sheet Metal, Air, Rail & Transportation Workers ("SMART").

Clinics (“Dr. Woods Plenum Comments”). Dr. Woods Plenum Comments and the Coalition OSHPD Plenum ND Comments set forth in detail substantial evidence that the OSHPD Plenum Amendments may result in significant public health and safety impacts.⁶ These impacts include the following:

A. Increased Risk of Airborne Infectious Disease Spread

The OSHPD Plenum Amendments increase the risk of pathogen spread in medical clinic settings. Numerous airborne infectious particles have been shown to be transported between spaces by ventilation systems, including tuberculosis, measles, Varicella zoster, and influenza. Airborne outbreaks of infectious diseases have occurred in clinic settings and are a significant concern.

Return air plenums are more likely to cause pressure imbalances in the system, which increases the risk of infection spread throughout the clinic. The pressure imbalances caused in non-pressurized exam rooms with plenum returns will affect the entire HVAC system, including treatment rooms with pressurization requirements.

Contrary to the Negative Declaration’s assumption, this risk cannot be controlled solely by early detection and isolation of infectious patients. Early detection is often not possible. The Association for Professionals in Infection Control and Epidemiology (“APIC”) warns that patients with unrecognized infectious diseases are frequently seen in clinics. APIC has found that infectious diseases account for 20-30% of physician office visits and there have been multiple outbreaks of measles, tuberculosis, and other infectious diseases traced to physician offices or clinics. Acute infection of the respiratory tract is the most common reason for consulting a physician.

Furthermore, early symptoms of highly infectious airborne diseases are identical to symptoms from many other sicknesses, including the common cold. Accordingly, carriers of airborne infectious diseases may be infectious before any identifying symptoms become evident. As a result, healthcare personnel often make multiple contacts with undiagnosed patients before they are recognized as

⁶ A compact disc with the supporting documents and reports referenced in the Dr. Woods Plenum Comments and the Coalition OSHPD Plenum ND Comments is being provided to the Commission by hand delivery.

infectious. The Negative Declaration, itself, acknowledges that patients with tuberculosis often receive care at public health and community clinics “prior to diagnosis and treatment.”

Even if early diagnosis were possible, isolation is not effective if a clinic does not have an airborne infection isolation room. OSHPD 3 clinics are not required to have such rooms or otherwise establish an infectious control infrastructure.

B. Increased Risk of Airborne Contaminant Spread

The use of plenum returns in clinics will also increase health risks to immune-compromised patients due to the fact that plenum areas are often contaminated with dusts, mold spores, rodent droppings and microorganisms from dead pests and other sources. When return air plenums are utilized instead of ducted returns, these contaminants are readily aerosolized and drawn into the return air of the HVAC system and then distributed directly into occupied spaces throughout the building. Above-ceiling plenums are also more prone to disturbance by maintenance activities that could release opportunistic fungi or allergens into a return airstream. Contaminated return air plenums and chases have been identified as sources of illness and infections to patients and building occupants.

A significant percentage of OSHPD 3 clinic patients are likely to be immune-compromised, including persons with diabetes and asthma – which are now at near epidemic levels in California. Immune-compromised patients are at greater risk of contracting airborne infectious diseases through exposure to aeroallergens, aerosolized fungi and bacteria, and viruses within the clinic. Accordingly, the Proposed Amendments will reduce protections against the spread of airborne infectious pathogens in clinics that will regularly serve the very populations most at risk from these pathogens.

C. Noise Impacts and Loss of Patient Privacy

The removal of the requirement for fully ducted HVAC systems may also result in substantial noise impacts resulting in the loss of patient privacy. Compared to ducted return air, plenums reduce noise attenuation and increase acoustic bridging between patient exam rooms and adjacent spaces. Noise control is of high importance in the health care environment because of the negative impact of high noise levels on patients and staff and because of the need to safeguard patient

privacy. The ASHRAE, HVAC Design Manual for Hospitals and Clinics thus recommends ducted returns to minimize “cross-talk” wherein audible conversations are transmitted between rooms via open return connections, particularly when room partitions do not extend above the ceilings. By allowing the use of plenum return air systems, the OSHPD Plenum Amendments will enable greater transmittance of sound energy between exam rooms resulting in loss of patient privacy.

D. Energy Impacts

The removal of the requirement for fully ducted HVAC systems may also result in greater energy demand and costs. The heat transfer from exterior plenum walls and roofs typically imposes additional thermal loads, which require additional heating and cooling capacities of the HVAC system, resulting in greater energy consumption.

E. Fire Safety Impacts

The Plenum Amendments will also increase fire safety risks due to the un-ducted HVAC system’s transfer of a continuous supply of oxygenated air into the plenum environment. Plenums contain substantially more flammable material than ducts. When combined with increased airflow from the HVAC system, the risk of fire and smoke spread is increased.

III. OSHPD’S SEPTEMBER 2015 INITIAL STUDY/NEGATIVE DECLARATION IS LEGALLY INADEQUATE TO SUPPORT APPROVAL OF THE PROPOSED OSHPD PLENUM AMENDMENTS

In September 2015, OSHPD, as the lead agency under CEQA, prepared the Initial Study/Negative Declaration for the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics (“Negative Declaration”). The Negative Declaration does not comply with the requirements of CEQA. CEQA requires preparation of an EIR if there is substantial evidence that any aspect of a project, either individually or cumulatively, may cause a significant effect on the environment. As discussed in

detail in the attached exhibits,⁷ substantial evidence exists that allowing the use of plenum returns in medical clinics may result in significant adverse impacts. Accordingly, an EIR must be prepared to evaluate these impacts.

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR, except in certain limited circumstances.⁸ An EIR aids an agency in identifying, analyzing, disclosing, and, to the extent possible, avoiding a project's significant environmental effects through implementing feasible mitigation measures.⁹ An EIR also serves "to demonstrate to an apprehensive citizenry that the [agency] has analyzed and considered the ecological implications of its action."¹⁰ Thus, an EIR "protects not only the environment but also informed self-government."¹¹

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment."¹² In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact. Negative declarations are allowed only in cases where there is not even a "fair argument" that the project will have a significant environmental effect.¹³

The "fair argument" standard is an exceptionally "low threshold" favoring environmental review in an EIR rather than a negative declaration.¹⁴ The "fair argument" standard requires preparation of an EIR, if any substantial evidence in

⁷ Dr. James Woods, *Review of Potential Impacts from the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* (November 16, 2015) and Coalition for Safe Building Materials & Joint Committee on Energy and Environmental Policy, *Comments on the Initial Study/Negative Declaration on the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* (October 19, 2015).

⁸ See, e.g., Pub. Resources Code, § 21100.

⁹ Pub. Resources Code § 21002.1(a); CEQA Guidelines § 15002(a), (f).

¹⁰ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.

¹¹ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

¹² Pub. Resources Code, § 21080, subd. (d) (emphasis added); CEQA Guidelines, § 15064; see also *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927; *Mejia v. City of Los Angeles* (2005) 13 Cal.App.4th 322.

¹³ *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Resources Code, §§ 21100, 21064.

¹⁴ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

the record indicates that a project may have an adverse environmental effect.¹⁵ As a matter of law, substantial evidence includes both expert and lay opinion.¹⁶ Even if other substantial evidence supports the opposite conclusion, the agency nevertheless must prepare an EIR.¹⁷ Under the “fair argument,” CEQA always resolves the benefit of the doubt in favor of the public and the environment.

The Dr. Woods Plenum Comments, along with the other evidence cited in the Coalition OSHPD Plenum ND Comments, provides substantial expert evidence that the OSHPD Plenum Amendments may result in significant adverse health, safety and environmental impacts. Accordingly, the OSHPD Plenum Amendments may not be approved or adopted until an EIR is prepared and circulated for public review and comment.

IV. THE OSHPD PLENUM AMENDMENTS FAIL TO MEET AT LEAST TWO OF THE NINE-POINT CRITERIA

Before the Commission may adopt the OSHPD Plenum Amendments, it must find that OSHPD has adequately justified adoption under the nine-point criteria analysis of Health and Safety Code section 18930. The OSHPD Plenum Amendments, however, fail to meet at least two of the nine-point criteria: (a) the requirement that the adoption of standards be in the public interest (Criteria 3); and (b) the requirement that the adoption of standards would not be unreasonable, arbitrary or unfair (Criteria 4). Accordingly, the Commission may not find that the amendments are justified under the Section 18930 criteria.

Adoption of the OSHPD Plenum Amendments would be contrary to the public interest and unreasonable, arbitrary and unfair because the approval of these regulations prior to the full compliance with CEQA would violate state law and could result in numerous public health, safety and environmental impacts. The OSHPD Plenum Amendments are also arbitrary because the environmental analysis they rely upon is erroneous and not supported by substantial evidence.

¹⁵ CEQA Guidelines, § 15064, subd. (f)(1); *Pocket Protectors v. City of Sacramento*, *supra*, 124 Cal.App.4th at 931.

¹⁶ Pub. Resources Code, § 21080, subd. (e)(1); CEQA Guidelines, § 15064, subd. (f)(5).

¹⁷ *Arviv Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.

Section 18930 requires findings under the nine-point criteria to be supported by substantial evidence. If the Commission determines that a factual finding is arbitrary or capricious or lacks substantial evidence, it shall return the standard back to the proposing agency for reexamination.¹⁸

A. Approval of the OSHPD Plenum Amendments without First Preparing an EIR Is Not In the Public Interest

Approval of the OSHPD Plenum Amendments without first preparing an adequate EIR would not meet the “public interest” element of the nine-point criteria. Health and Safety Code section 18930, subdivision (3), requires agencies to determine if the “public interest requires the adoption of the building standards.” In the case at hand, adopting the OSHPD Plenum Amendments without first finalizing a legally adequate EIR would violate the requirements of CEQA. Such deliberate violation of the law would, in itself, be contrary to the public interest. Approval of the OSHPD Plenum Amendments would also be contrary to the potential for the code change to result in significant environmental and public health and safety impacts.

It is well settled that compliance with CEQA is in the public interest.¹⁹ CEQA “protects not only the environment but also informed self-government.”²⁰ CEQA informs the public and its responsible officials of the environmental consequences of their decisions before they are made, ensuring consideration of alternatives and requiring imposition of reasonable mitigation measures.²¹

As discussed in detail in the attached comments, reliance on the inadequate Negative Declaration would violate CEQA. The Negative Declaration fails to fully disclose, evaluate or mitigate potential impacts and violates numerous other requirements of CEQA. As a result, reliance upon the Negative Declaration to support approval of the OSHPD Plenum Amendments would be contrary to the public’s interest in ensuring informed self-government and in protecting public health and safety and the environment.

¹⁸ Health & Saf. Code § 18930, subd. (d) (1).

¹⁹ See *Kane v. Redevelopment Agency of City of Hidden Hills* (1986) 179 Cal.App.3d 899, 905; *People By and Through Dept. of Public Works v. Bosio* (1975) 47 Cal.App.3d 495, 526; see also Pub. Resources Code § 21000.

²⁰ *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal.App.4th 98, 108.

²¹ *Id.*; Pub. Resources Code §§ 21063 & 21100.

The evidence in the record, including the expert comments and studies accompanying this letter, overwhelmingly demonstrates that the OSHPD Plenum Amendments may have a significant effect on the environment. Approval of the Amendments without full disclosure, evaluation and mitigation of these impacts would not be in the public's interest. Accordingly, adoption of the OSHPD Plenum Amendments may not be justified under the nine-point criteria.

B. Approval of the OSHPD Plenum Amendments without First Preparing an EIR Is Unreasonable, Arbitrary and Unfair

Health and Safety Code section 18930, subdivision (4), requires agencies to justify their proposed building standards on the grounds that the proposed standard "is not unreasonable, arbitrary, unfair, or capricious, in whole or in part." In the case at hand, it is manifestly unreasonable, arbitrary and unfair to propose the adoption of building standards in a manner contrary to law. As discussed in detail in the attached comments, approving the OSHPD Plenum Amendments based upon a Negative Declaration is a clear violation of CEQA. Such approval may not be justified under the nine-point criteria.

Furthermore, approval of the OSHPD Plenum Amendments is unfair and unreasonable due to the substantial evidence of potential significant impacts associated with this approval. Modification of a building standard without first requiring full disclosure, evaluation and mitigation of the potential impacts from this change is unfair to the public. Moreover, exempting medical clinics from long-standing plenum restrictions without disclosure, evaluation and mitigation of the potential impacts from such change is unreasonable.

V. CONCLUSION

The evidence submitted herein to the Commission demonstrates that approval of the OSHPD Plenum Amendments may result in significant impacts on public health and the environment. As a result, the proposed approval of the Proposed OSHPD Plenum Amendments would be contrary to the public interest. The evidence submitted further demonstrates that reliance on a Negative Declaration is not sufficient to comply with the requirements of CEQA. Preparation of an EIR is necessary to fully disclose the extent of these potential impacts.

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Until a legally adequate EIR is completed and feasible, meaningful mitigation is imposed, the OSHPD Plenum Amendments must be disapproved or, in the alternative, held for further study. Thank you for your consideration of this letter and the enclosed Exhibits.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas A. Enslow", with a long horizontal flourish extending to the right.

Thomas A. Enslow

TAE:lj1

EXHIBITS:

(1) Coalition for Safe Building Materials & Joint Committee on Energy and Environmental Policy, *Comments on the Initial Study/Negative Declaration on the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* (October 19, 2015); and

(2) Dr. James Woods, *Review of Potential Impacts from the Proposed California Mechanical Code Change Allowing Plenum Return Air in Certain Areas of OSHPD 3 Clinics* (November 16, 2015)

[A compact disc with the documents referenced in these exhibits is being hand delivered to Commission. Paper copies of these reference documents are available upon request.]